

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

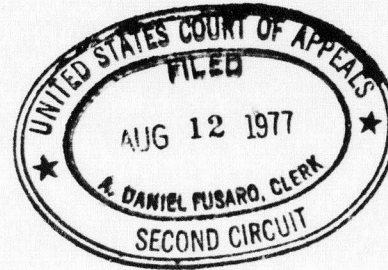
77-1267

To be argued by
STEVEN LLOYD BARRETT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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:
UNITED STATES OF AMERICA,
:
Plaintiff-Appellee,
:
-against-
:
ZALMON SCHNITZER,
:
Defendant-Appellant.
:
-----X

B
P/S
Docket No. 77-1267



BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ZALMON SCHNITZER,

Defendant-Appellant.

Docket No. 77-1267

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the District Court lacked jurisdiction to decide the motion for expungement, since the motion did not comply with the requirements for instituting a civil action, a defect not cured by invocation of the ancillary jurisdiction doctrine.

2. Whether the District Court erred in denying the motion for expungement, since the severe hardship of an arrest record threatens appellant's rabbinical studies and admission to the rabbinate, the type of extreme circumstance mandating expungement.

RELIMINARY STATEMENT

This is an appeal from an order of the United States District Court for the Eastern District of New York (The Honorable Jacob Mishler, Ch.J.) dated March 9, 1977, denying appellant Zalmon Schnitzer's motion for an order expunging his arrest record and securing the return of his fingerprints and photographs pertaining to a criminal action (76 Cr. 476) which had previously terminated with the dismissal of the indictment against Mr. Schnitzer.

This Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

Count One of a two-count indictment filed in the Eastern District of New York on July 27, 1976,* charged Leonard Fortgang and Zalmon Schnitzer (appellant herein) with conspiring to defraud the Federal Insurance Administration by filing a false claim (18 U.S.C. §285). Mr. Fortgang alone was charged in Count Two with bribing a Government official in connection with this claim (18 U.S.C. §201(b)), and he pleaded guilty to

*The indictment is reproduced as "B" to the separate appendix to appellant's brief.

this count, in satisfaction of the indictment, on September 13, 1976. At these plea proceedings, the Government announced its intention to file a superseding indictment against Mr. Schnitzer.*

In a letter dated November 30, 1976, Mr. Schnitzer wrote to the Honorable Jacob Mishler, Ch.J., noting that no superseding indictment had been filed and requesting a speedy trial:

I want this matter cleared up, your honor.
Since August I have been out on bail. The
old indictment is still pending against me.
There is a cloud on my name and reputation.
I want it removed by a trial or by dismissal
of my indictment, as soon as possible.[**]

These sentiments were repeated in a letter from counsel to the Assistant United States Attorney dated December 1, 1976.*** On January 7, 1977, the Government moved to dismiss the indictment against Mr. Schnitzer, and Judge Mishler entered an order of dismissal.****

By motion***** dated February 9, 1977, Mr. Schnitzer sought an order expunging his arrest record and securing the return of

*Minutes of September 13, 1976 (Document #5 to the Record on Appeal), at 11.

**This letter appears in full as Document #6 to the Record on Appeal.

***This letter appears in full as Document #7 to the Record on Appeal.

****This order appears as "C" to the separate appendix to appellant's brief.

*****This motion and counsel's affidavit are reproduced as "D" to the separate appendix to appellant's brief.

his fingerprints and photographs pertaining to these proceedings. The motion was filed as part of the criminal proceeding, i.e., the caption was identical to that of the criminal prosecution which had been dismissed, and neither a docketing fee was paid nor summons and complaint filed or served, as required in a civil action. In the accompanying affidavit, counsel expanded on the relief sought in the motion, requesting that the order of expungement be directed to the Department of Justice and the Federal Bureau of Investigation (Appendix D at 4); however, neither body was named as a respondent, nor was either served with the motion. Regarding the substance of Mr. Schnitzer's claim, counsel related the following (Appendix D at 3):

Since [Mr. Schnitzer] came to this country twenty-five years ago from Germany, he has never been convicted of any crime. He is a naturalized American citizen and has for many years been a rabbinical student at the United Talmudic Academy, 82 Lee Avenue, Brooklyn, New York. The goal of the rabbinate, which he is seeking, makes the existence of a criminal record particularly poignant for him.

The Government opposed this motion, on both jurisdictional and substantive grounds, in an affidavit filed on February 17, 1977.*

In an opinion filed March 9, 1977,** Judge Mishler denied the motion on the merits, stating inter alia (Appendix E at 5-6):

*This affidavit appears as "E" to the separate appendix to appellant's brief.

**Judge Mishler's opinion appears as "F" to the separate appendix to appellant's brief.

Courts have been hesitant to order expungement of records in the absence of extraordinary circumstances. For example, unless it appears the arrest was without probable cause or there is a concrete showing that the retention of records is injurious, courts are not apt to exercise their equitable powers.

In the instant case, Schnitzer was lawfully arrested pursuant to an indictment handed down by a grand jury. Never was there a challenge to the validity of the accusatory instrument. While the criminal indictment was dismissed, the government continues to prosecute him civilly. The dismissal, since it is not an adjudication on the merits, does not necessarily mean the defendant is innocent of the charges; the government is free to continue criminal prosecution. Moreover, defendant makes no particularized showing that the retention of his arrest record is in any way prejudicial; he makes only a generalized claim that it presents a "poignant" problem for one, such as he, who is studying for the rabbinate. It cannot be said that his privacy rights have been unnecessarily invaded. Herein, the interests of the government in effective law enforcement clearly outweigh those of the defendant.

(Citations omitted.)

The court's consideration of its jurisdiction to decide this motion was addressed in a footnote (Appendix F at 3, n.1):

As the government suggests, the instant matter is more appropriately brought on as a separate civil action since the underlying criminal action is closed. See United States v. Dooley, 364 F.Supp. 75 (E.D.Pa. 1973). If presented in a civil context, however, it would still be assigned to this court as a related matter. Therefore, in the interests of judicial economy, we will treat the motion as ancillary to the criminal indictment.

ARGUMENT

Point I

THE DISTRICT COURT LACKED JURISDICTION TO DECIDE THE MOTION FOR EXPUNGEMENT, SINCE THE MOTION DID NOT COMPLY WITH THE REQUIREMENTS FOR INSTITUTING A CIVIL ACTION, A DEFECT NOT CURED BY INVOCATION OF THE ANCILLARY JURISDICTION DOCTRINE.

Appellant is obliged to note that, under the analysis presented in United States v. Huss, 520 F.2d 598 (2d Cir. 1975), the District Court's jurisdiction may not have been properly invoked, and this Court may find that the lower court lacked jurisdiction to decide the motion for expungement.* Since Fed.R.Civ.P. 12(h)(3) provides that "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action,"** a jurisdictional defect at bar would require that Judge Mishler's order be vacated and that appellant's motion for expungement be dismissed without prejudice to renew the claim in a proceeding in which jurisdiction is settled. See

*That it was appellant who sought to invoke the District Court's jurisdiction by the motion for expungement does not estop him from raising the jurisdictional defect before this Court on appeal. See American Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951); Woodward v. D.H. Overmyer Co., 428 F.2d 880 (2d Cir. 1970), cert. denied, 400 U.S. 993 (1971).

**See also C.Wright, LAW OF FEDERAL COURTS §7, at 15-16 (1970); Mansfield, C. & L.M. Ry. v. Swan, 111 U.S. 379 (1884).

United States v. Huss, supra, 520 F.2d at 606.*

Appellant's papers consisted of a notice of motion and affidavit of counsel filed one month after termination of the criminal proceedings by dismissal of the indictment. The motion was on nine days' notice to The Honorable David G. Trager, United States Attorney, Eastern District of New York, and contained the same caption (including the criminal docket number) as in the concluded criminal proceedings. Though the affidavit recited that an order was sought against the Department of Justice and the Federal Bureau of Investigation, neither body had been made party to the action.

These papers appear to be deficient under United States v. Huss, supra, 520 F.2d at 604-605. There, this Court was presented with a nearly identical procedural situation: the appellant, who had been prosecuted in federal court, filed a motion before the district judge presiding at the criminal proceedings after termination of the proceedings; this motion made no reference to the court's jurisdiction to consider it; the motion was titled with the criminal caption (including the criminal docket number) and, though it sought an order against the Bureau of Prisons, was served only on the United States Attorney, and it sought relief that was civil by nature -- an

*Appellate counsel notes that this argument and the relief it entails -- dismissal of the original motion with leave to reinstitute the matter as a properly fashioned civil proceeding -- are matters which have been discussed with appellant Schnitzer, who agrees that this claim should be presented.

order that the Bureau of Prisons provide kosher food -- without following the procedures and formal filing requirements necessary to institute a civil action. When the briefs on appeal did not address the jurisdictional question, this Court requested additional briefs, and ultimately found every basis of jurisdiction advanced to be wanting.* Most relevant here is the Court's discussion concerning the proposal that jurisdiction was conferred by 28 U.S.C. §1361, since that jurisdictional statute is the one basis which would be most clearly applicable to a civil suit by appellant seeking expungement:

It has been held that §1361 affords a district court with proper venue the jurisdiction to consider a claim that actions of federal prison officials violate first amendment rights.[**] [Citations omitted.] But there are insurmountable difficulties with an attempt to justify adjudication of the issues presented sub judice as if they were presented in a complaint seeking mandamus relief.

In the first place, the application below was not filed as a civil action, no docketing fee was paid, no summons or complaint was

*The five jurisdictional grounds presented which were considered at length by this Court were (1) inherent power to control place or conditions of confinement; (2) Rule 35, Fed. R.Crim.P.; (3) 28 U.S.C. §2255; (4) 28 U.S.C. §1361; and (5) 28 U.S.C. §2241.

**Similarly, 28 U.S.C. §1361 affords a district court having proper venue the jurisdiction to compel officers of the Department of Justice and the Federal Bureau of Investigation to expunge a defendant's criminal record and return his fingerprints and photographs. This appears (though it is not stated) to have been the jurisdictional basis for the suit seeking similar relief in Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974).

filed or served, and no federal respondent was named or served. Secondly, neither the two-page motion nor the testimony indicates facts which would establish venue in the Southern District of New York.... There are, after all, orderly processes designed to assure that civil litigation will go forward in a genuinely adversarial context, and 28 U.S.C. §1653 which permits amendment of pleadings to show jurisdiction, does not permit us to disregard these processes entirely.

United States v. Huss, supra,
520 F.2d at 604-605.

Because counsel below filed the action for expungement by a procedure which did not properly institute the civil action necessary to obtain the relief sought, appellant's motion failed properly to invoke the jurisdiction of the District Court, and that court was not authorized to reach the merits of the underlying claim. As was ordered in United States v. Huss, supra, 520 F.2d at 606, appellant should be permitted to reinstitute this action as a civil case in which jurisdictional requirements are satisfied.

The District Court, it should be noted, did not address Huss or the problems considered therein, although the Government had raised the matter and had cited Huss in the affidavit in opposition to appellant's motion. The court below discussed the jurisdictional posture of the case only in a footnote, in which it stated that, while the claim was "more appropriately brought on as a separate civil action," it had undertaken to decide the motion as "ancillary to the criminal indictment." While appellant's claim may indeed have been

justiciable under the court's ancillary jurisdiction,* appellant failed to invoke that jurisdiction through proper filing and service pursuant to the applicable procedures.** The failure to follow the required federal procedures for instituting an ancillary claim against a third party creates the identical case or controversy/jurisdiction deficiencies this Court addressed in United States v. Huss, supra, and equally

*Whether or not a motion to expunge a criminal arrest record is within a federal district court's ancillary jurisdiction is not settled in this Circuit. While a district court's power to issue orders beyond the discrete confines of a criminal prosecution in order to preserve justice in that proceeding cannot be doubted (see Sheppard v. Maxwell, 384 U.S. 333, 356-363 (1966)), the power to issue orders not related to the subject proceeding, but to the consequences of that proceeding, is less clear. By far the most complete and thoughtful analysis on point is Judge Wright's examination of whether a motion to prevent dissemination of an arrest record is ancillary to a criminal proceeding. Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969). Judge Wright formulated a precise, four-pronged standard for ancillary jurisdiction (id., 417 F.2d at 740), and then determined that a court, sitting in a criminal prosecution, had ancillary jurisdiction to issue protective orders regarding dissemination of arrest records (id., 417 F.2d at 740-741). Though appellant questions the District Court's jurisdiction to have reached the merits of his claim, under constraint of United States v. Huss, supra, 520 F.2d 598, he does not contend that his claim was beyond the court's ancillary jurisdiction had that jurisdiction properly been invoked. See generally Aldinger v. Howard, 427 U.S. 1, 10-11 (1976); Mine Workers v. Gibbs, 383 U.S. 715, 725-726 (1966); Moore v. New York Cotton Exchange, 270 U.S. 593, 610 (1926); Fulton Bank v. Hozier, 267 U.S. 276, 280 (1925); C.Wright, LAW OF FEDERAL COURTS §9 (1970).

**See Fed.R.Civ.P. 13-15, 18-20.

precludes adjudication of the claim on the merits.*

Appellant recognizes that his position in this argument -- attacking his own motion for jurisdictional deficiencies -- is somewhat awkward. However, two points should be considered in this regard. First, Huss presents this Court's appraisal of the procedural requirements for invoking the jurisdiction of the District Court in post-judgment civil actions involving related matters. As such, this Court may conclude that Huss barred the District Court from exercising its jurisdiction over appellant's claim, and consequently, it is irrelevant which party now raises the problem. Second, Huss concerns not merely formalistic requirements for invoking jurisdiction but dangers incident to improper initiation of a civil action, such as the critical inadequacy of failing to plead facts sufficient to support a claim. In the present case, the District Court found an inadequate factual basis alleged for the relief sought;

*Other federal courts have entertained motions for expungement incident to criminal prosecutions apparently with no more than a criminal-captioned motion, as here. See United States v. Linn, 513 F.2d 925, 927 (10th Cir. 1975); United States v. Seasholtz, 376 F.Supp. 1288 (N.D.Okla. 1974); United States v. Dooley, 364 F.Supp. 75, 76-77 n.1 (E.D.Pa. 1973); United States v. Rosen, 343 F.Supp. 804 (S.D.N.Y. 1972). In each of these cases there was no consideration of the jurisdictional questions raised in United States v. Huss, *supra*, which undoubtedly will alter the casual attitude toward jurisdictional requirements evident in those decisions.

and if this Court concludes that the District Court was correct, this shortcoming -- one of the concerns Huss contemplates -- will be remedied when appellant brings a civil action attentive to the pleading requirements of the Federal Rules. Appellant therefore requests that the District Court order denying the motion to expunge be vacated and that the District Court be directed to enter an order dismissing appellant's motion without prejudice to reinstitute a civil action seeking expungement.

Point II

THE DISTRICT COURT ERRED IN DENYING
THE MOTION FOR EXPUNGEMENT, SINCE
THE SEVERE HARDSHIP OF AN ARREST
RECORD THREATENS APPELLANT'S RAB-
BINICAL STUDIES AND ADMISSION TO
THE RABBINATE, THE TYPE OF EXTREME
CIRCUMSTANCE MANDATING EXPUNGEMENT.

If jurisdiction is found to have existed in the District Court, its decision on the merits of appellant's claim should be vacated as clearly erroneous. For in denying the expungement of appellant's arrest record, the court was insensitive to the severe hardship appellant, a rabbinical student, is bound to suffer.

Expungement of an arrest record, along with the return of fingerprints and photographs, is not authorized by any federal statute, but instead is an equitable doctrine formulated by the courts.* The relief is most commonly granted to redress

*The absence of specific legislation -- and of a "definitive, all purpose rule to govern requests of this nature" (United States v. Linn, supra, 513 F.2d at 927) -- accounts in part for the reluctance of courts to grant this relief under ordinary circumstances. See United States v. Linn, supra; United States v. Seasholtz, supra, 376 F.Supp. at 1289; United States v. Dooley, supra, 364 F.Supp. at 79; United States v. Rosen, supra, 343 F.Supp. at 806-807. New York State has taken the legislative route on this question; C.P.L. §160.50 provides an automatic mechanism which guarantees expungement and the return of fingerprints and photographs in all cases in which the defendant has been acquitted or the action dismissed. However, it is unlikely that the Congress will follow this approach, and it must undoubtedly devolve upon the federal courts to refine the rules relating to expungement upon termination of a criminal action in favor of an accused. This, it is respectfully submitted, will require de-

an unlawful arrest,* but the "extreme circumstances" test (United States v. Rosen, *supra*, 343 F.Supp. at 807; Wheeler v. Goodman, 306 F.Supp. 58, 65 (W.D.N.C. 1969)) is not necessarily so limited and allows for expungement where the harm likely to occur is unusually serious. For instance, in Kovall v. United States, 53 F.R.D. 211 (W.D.Mich. 1971), the court upheld an order expunging the arrest record of a defendant whose conviction for failure to report for induction had been overturned. Among the court's comments were the following:

The question presented here is whether a court, where the facts of an individual \$2255 case convince it that justice so requires, can order that records of a given arrest be removed from this data. Absent express language prohibiting such

(Footnote continued from the preceding page)

velopment from the present approach exemplified by the aforementioned cases -- essentially a renunciation of judicial discretion outside a narrow range of special exceptions -- to a more reasonable approach exemplified by Judge Wright's decision in Morrow v. District of Columbia, *supra*, 417 F.2d at 740-743 -- a scrupulous balancing, under the specific circumstances, of the need to preserve the arrest record of a given suspect (see 28 U.S.C. §534(a): Acquisition, preservation, and exchange of identification records) and the documented harm likely to befall one with an arrest record (see Comment, The FBI's Right to Retain and Disseminate Arrest Records of Persons Not Convicted of a Crime May Be Limited by the First and Fifth Amendment, 46 N.Dame Law. 825, 829-831 (1971); President's Commission on Law Enforcement and the Administration of Justice, The Challenge of Crime in a Free Society 75 (1967)).

*E.g., Sullivan v. Murphy, 478 F.2d 938, 968-971 (D.C. Cir. 1973); United States v. McLeod, 385 F.2d 734 (5th Cir. 1967); Washington Mobilization Committee v. Cullinane, 400 F.Supp. 186, 217-218 (D.D.C. 1975); Hughes v. Rizzo, 282 F.Supp. 881 (E.D.Pa. 1968).

judicial action, the statutory and regulatory bases for criminal intelligence activity by federal agencies are of no assistance with respect to this issue.

* * * *

A reading of applicable cases indicates that there is no such general rule. In each case, the court must weigh the reasons advanced for and against expunging arrest records. If it is found after careful analysis that the public interest in retaining records of a specific arrest is clearly outweighed by the dangers of unwarranted adverse consequences to the individual, then the records involved may properly be expunged.

Id., 53 F.R.D. at 213-214.

This balancing test is applicable to situations beyond the common illegal arrest claim; it recognizes the equitable character of expungement.

Appellant's situation is one which, notwithstanding the legality of his indictment and arrest, merits expungement of the arrest record. That appellant's indictment was dismissed upon motion of the Government prior to any adjudicative proceedings suggests that appellant actually committed no crime; as Chief Judge Bazelon has said:

Presumably, the guilty are more likely to be prosecuted than the innocent. In consequence, one would expect that the class of individuals arrested but not prosecuted would contain a substantially lower proportion of guilty persons than the class of all persons arrested.

Menard v. Mitchell, 430 F.2d
486, 493 n.38 (D.C. Cir. 1970).

Appellant, it is recalled, consistently and adamantly maintained his innocence, and demanded a trial "as soon as pos-

sible" to remove the "cloud on my name and reputation," a fact which contributes to a sound belief that he was not guilty of any wrongdoing. Moreover, this case is further distinguished by the nature and extent of harm appellant is likely to suffer so long as his arrest record exists. The impeccable moral credentials required for acceptance in the rabbinate -- not to mention the extraordinary standards by which one seeking a congregation is judged -- might not allow a rabbinical student who has an arrest record to achieve this stature; the most significant ambition in appellant's life will, in all likelihood, be frustrated unless his arrest record is expunged. When counsel below referred to the "poignant" problem confronting appellant in connection with the effect of an arrest record on his desire to become a rabbi, he no doubt had in mind the extreme degree to which the following considerations pertain to appellant:

Information denominated a record of arrest, if it becomes known, may subject an individual to serious consequences. Even if no direct economic loss is involved, the injury to an individual's reputation may be substantial. Economic losses themselves may be both direct and serious. Opportunities for schooling, employment, or professional licenses may be restricted or non-existent as a consequence of the mere fact of an arrest, even if followed by acquittal or complete exoneration of the charges involved.

Menard v. Mitchell, *supra*,
430 F.2d at 490.* (Footnotes
omitted.)**

*This decision (Menard I) remanded the matter for further

When this consideration is balanced against the absence of any conceivable governmental need for the arrest records of one who is seeking to become a religious leader, the propriety of expungement is manifest. It is respectfully requested that,

(Footnotes continued from the preceding page)

fact determination pertaining to expungement and reversed the summary judgment which had been entered for the Government. Subsequently, the case returned to the Court of Appeals as Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974) (Menard II), and, again reversing the District Court, that appeals court ordered expungement. The basis for this ruling was that the petitioning appellant had not been arrested, but merely detained, and that detention did not justify maintenance of an arrest record. Nevertheless, the court, as it had in Menard I, addressed the broader concerns to which the expungement remedy applied and stressed the "undoubted 'social stigma' involved in an arrest record." Id., 498 F.2d at 1023-1024. See also United States v. Doe (Schwartz), 457 F.2d 895, 898 (2d Cir. 1972) ("[Detention by law enforcement officers] is abrupt, is effected with force or the threat of it and often in demeaning circumstances, and, in the case of arrest, results in a record involving social stigma" [emphasis supplied]); Comment, The FBI's Right to Retain and Disseminate Arrest Records of Persons Not Convicted of a Crime May Be Limited by the First and Fifth Amendment, supra, 46 N.Dame Law. at 829-831.

**Though footnotes have been omitted from this quotation for brevity, we note for the Court's information that the footnotes to this passage and throughout the decision in Menard I provide numerous authorities which establish beyond question the deleterious effects of an arrest record.

should this Court find the jurisdictional requirements to have been satisfied, appellant's arrest records be ordered expunged and his photographs and fingerprints returned.*

*This relief can be accomplished by a court order directed to the Identification Division of the FBI. The Bureau recently explained the procedure in Federal Bureau of Investigation's Fingerprint Contributor Letter 77-1 (April 3, 1977): "The Identification Division responds to a Federal court order for the return of a Federal arrest fingerprint card as a legal responsibility. In this regard, the fingerprint card is removed from our files and returned to the contributor, the United States Attorney or other agency, in accordance with the wording of the court order. Whether a fingerprint card pertains to a Federal or non-Federal arrest, its return to the contributor automatically and completely expunges that arrest entry from our files. As a matter of policy and fairness, the Identification Division sends a notice of the reason for the expunction to all prior recipients of the identification record containing the expunged arrest entry."

CONCLUSION

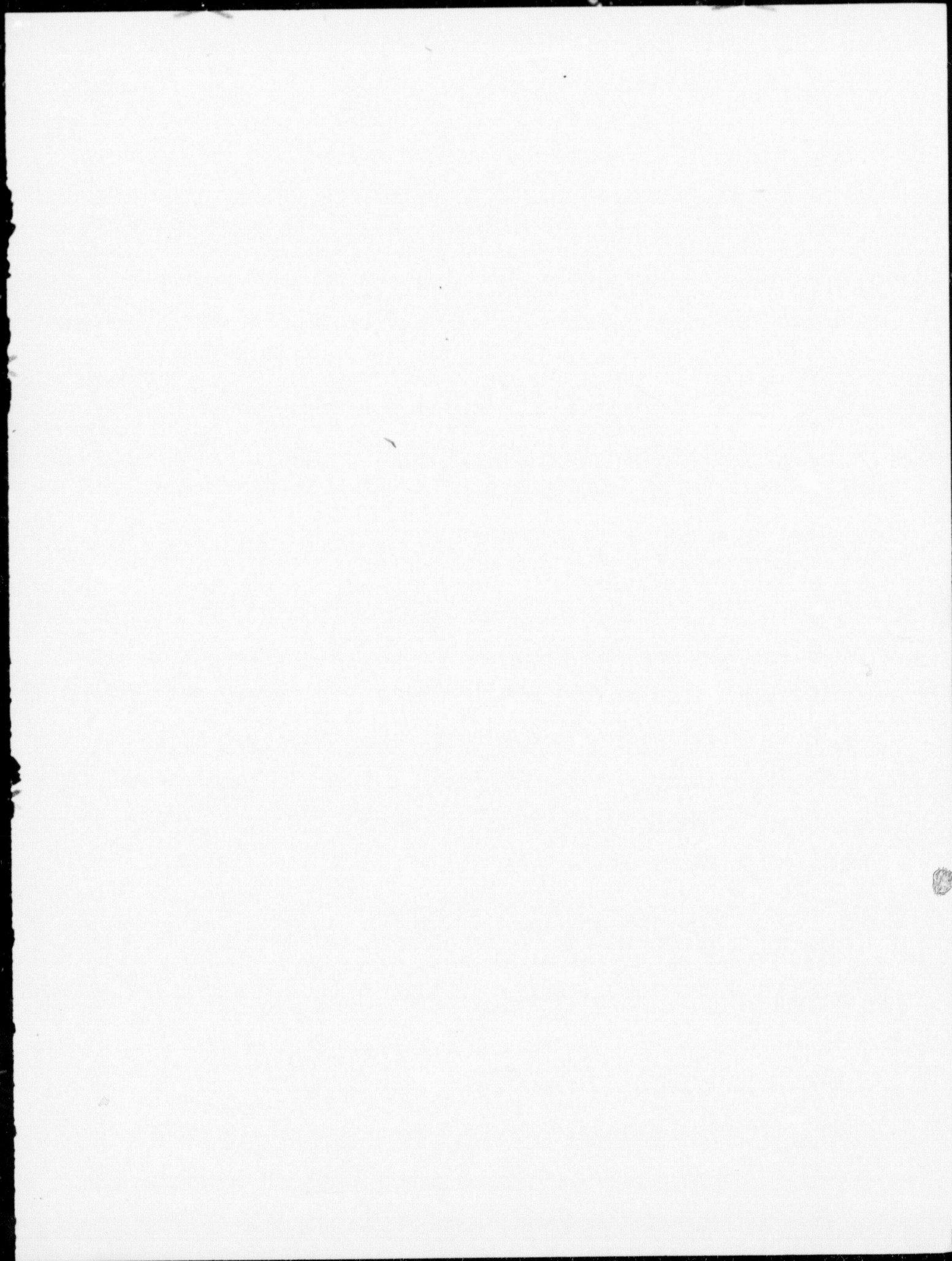
For the above-stated reasons, the District Court order denying the motion to expunge should be vacated and the District Court directed to enter an order dismissing Mr. Schnitzer's motion without prejudice to institute a civil action; alternatively, the District Court order denying the motion to expunge should be vacated and Mr. Schnitzer should be granted expungement of his arrest record and the return of his fingerprints and photographs.

Respectfully submitted,

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August 12, 1977



CERTIFICATE OF SERVICE

August 12, 1977

I hereby certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Steven H. d. Barnett